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OCTOBER TERM, 1944

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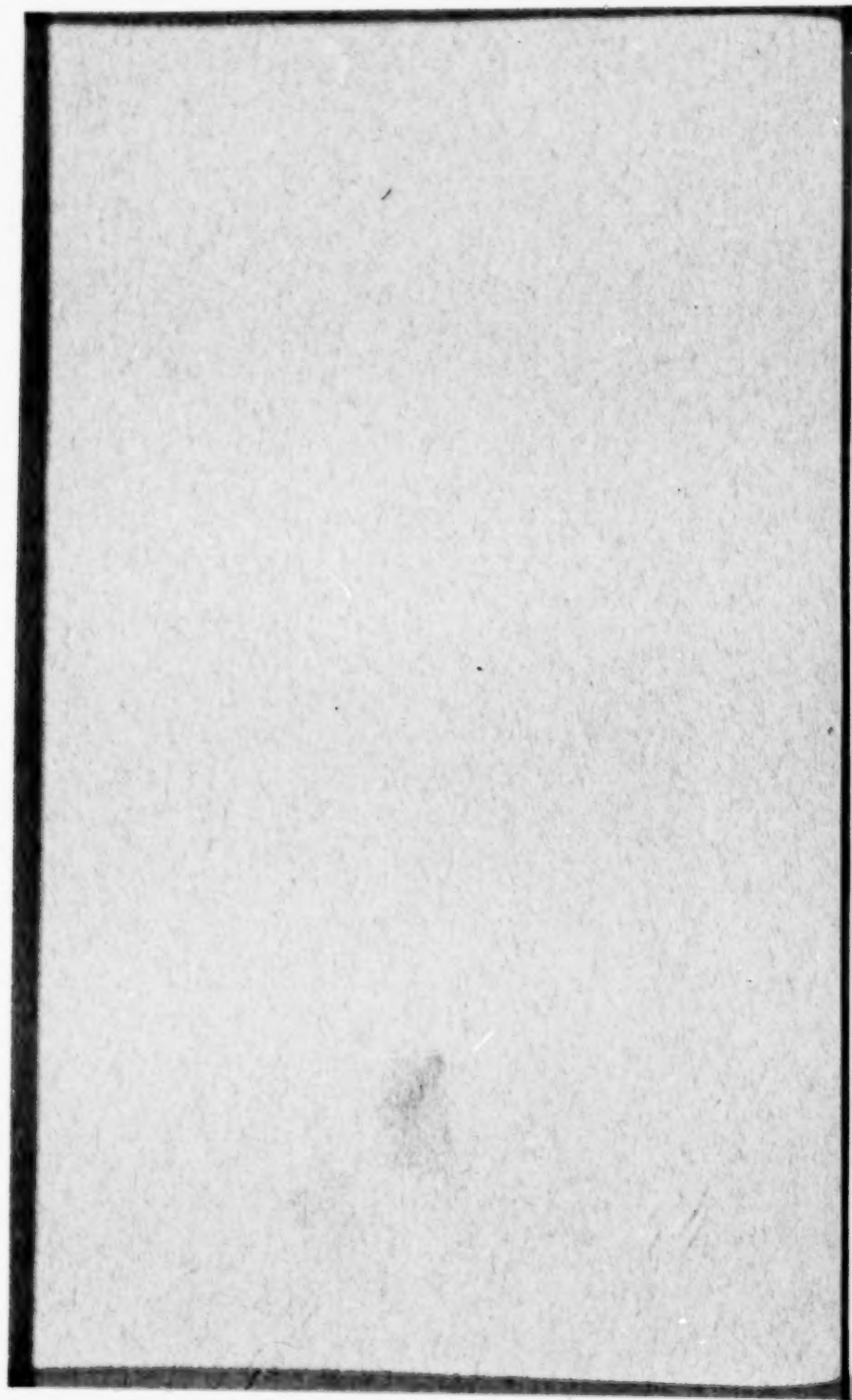
ESTATE OF ROBERT MARSHALL, JAMES MARSHALL, Executor,
Petitioner,
against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF**

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Supreme Court of the United States

OCTOBER TERM, 1944

No.

ESTATE OF ROBERT MARSHALL, JAMES MARSHALL, Executor,
Petitioner,
against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, James Marshall, as Executor of the Estate of Robert Marshall, deceased, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit (No. 49, October Term, 1944) entered February 9, 1945.

Jurisdiction

Under Section 240 (a) of the Judicial Code as amended, this Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Second Circuit. This Court should exercise its power of review in view of the startling and unsupported pronouncement by the Court below, in denying tax exemption under Section 812 (d) of the Internal Revenue Code to the educational trusts created

under the Testator's Will, that such trusts are not entitled to the exemption provided by the statute because the objects and purposes thereof "were not to promote ends long accepted as socially desirable, but to reform rather than merely to support existing systems" (R. 63-64).

Moreover, the Court below formulated one rule of interpretation for charitable gifts to church groups and a different rule less favorable for other groups. There is no ground in the statutes, or the decisions of this Court for such a ruling, which is in conflict with the decisions of other Federal Courts and of this Court.

History of Case

This case arose in the Tax Court of the United States in a proceeding for the redetermination of a deficiency in estate taxes determined by the respondent in the amount of \$346,305.04 (R. 3-12). On January 26, 1944, the Tax Court of the United States decided that there was a deficiency in the estate tax in the amount of \$322,722.15 (R. 46). On appeal to the United States Circuit Court for the Second Circuit, that determination was affirmed in an opinion written by Circuit Judge Augustus N. Hand, dated January 23, 1945 (R. 58-63). The judgment of affirmance was entered on February 9, 1945, after denial of a petition for rehearing (R. 64). The opinion of the Court below has not as yet been officially reported.

Statement of Facts

Robert Marshall died November 11, 1939. He was a resident of the City and State of New York. In his last will and testament he created three trusts.

The provisions of the will setting forth the objects and purposes of the first trust, the so-called "Economic Trust", and the powers of the trustees, read as follows:

"The education of the People of the United States of America to the necessity and desirability of the development and organization of unions of persons engaged in work or of unemployed persons and the promotion and advancement of an economic system in the United States based upon the theory of production for use and not for profit. The objects and purposes herein set forth shall be carried out through lawful means and only through lawful means, and for the purpose of carrying out such objects and purposes, I grant to the Trustees named full power and authority to employ and pay organizers, lecturers and writers and such other assistants and employees as they may deem necessary for properly fulfilling the objects and purposes of the trust as set forth by me herein, and to print, publish and distribute pamphlets, books, magazines and newspapers and generally to use any and all lawful means toward the furtherance of such objects and purposes, and they shall further have the authority to draft bills and acts, laws and other legislation and use all lawful means to have the same enacted into the law of the various States of the United States of America and by the Congress of the United States of America" (R. 18).

The objects and purposes of the second trust, the so-called "Civil Liberties Trust", read as follows:

"The safeguarding and advancement of the cause of civil liberties in the United States of America and the various States and subdivisions thereof by all lawful means and actions, with full power and authority to the Trustees to print, publish and distribute pamphlets, books, magazines and newspapers and generally to use any and all lawful means to bring to the knowledge of the citizens of the United States of America the importance and necessity of preserving and safeguarding the cause of civil liberties. Said Trustees shall have the power to draft bills and acts, laws and other legislation and use all lawful means

to have them enacted into the law of the various States and subdivisions thereof and by the Congress of the United States to the end that the civil liberties guaranteed to the citizens of the United States by their Federal constitution and by the various State constitutions be forever maintained, preserved and developed" (R. 19).

The objects and purposes of the third trust, the so-called "Wilderness Trust", read as follows:

"The preservation of the wilderness conditions in outdoor America, including, but not limited to, the preservation of areas embracing primitive conditions of transportation, vegetation and fauna, and to that end said Trustees shall have full power and authority to employ and pay lecturers and writers and such other assistants and employees as they may deem necessary for properly carrying out the purposes of the trust and to print, publish and distribute pamphlets, books, magazines and newspapers and generally to use any and all lawful means to increase the knowledge of the citizens of the United States of America as to the importance and necessity of maintaining wilderness conditions in outdoor America for future generations, and said Trustees shall be empowered to use all lawful means in opposing statutes or regulations which will or may affect adversely the maintenance of wilderness conditions, and said Trustees shall have the power to draft such bills and acts, laws and other legislation and use all lawful means to have the same enacted by the various States of the United States of America and by the Congress of the United States as will tend to safeguard and preserve wilderness conditions in outdoor America" (R. 20).

Section 812 (d) of the Internal Revenue Code, at the time of the decedent's death, read as follows:

"(d) Transfers for Public, Charitable and Religious Uses.—The amount of all bequests, legacies, devises, or transfers, (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, de-

vise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate." (Emphasis ours; R. 42-43.)

Question Presented

Were the trusts created by Robert Marshall in his last will and testament exempt from taxation under the above-cited provisions of Section 812 (d) of the Internal Revenue Code?

The determination of this question involves several interesting and very important issues.

1. Are the basic purposes of the trusts exclusively for charitable or educational purposes under the provisions of Section 812 (d)?

2. Were the trusts any the less charitable or educational because of the power granted to the trustees to draft legislation and to use all lawful means to have the same enacted into law?

3. Did the provision in the statute regarding "carrying on propaganda, or otherwise attempting, to influence legislation" by corporations have any application herein in the light of the historical background of the statute and the fact that, at the time of decedent's death, that provision did not apply to gifts to trustees?

4. Was not the language of the will concerning legislation merely permissive and, therefore, not a primary purpose or object of the trusts but rather incidental to such primary purpose?

5. Did the mere grant of power to the trustees to transfer the property to a non-profit corporation which might be organized by them for the same objects and purposes for which the trusts were created justify the Court in treating the bequests as though made directly to a corporation?

6. Did not the court below apply a different rule of law in this case to that applied by the Court of Appeals of the District of Columbia, the Circuit Court of Appeals for the Third Circuit and the District Court for the District of Massachusetts?

Reasons for Granting the Writ

The opinion of the Circuit Court failed to meet the issues presented above. The decision was based on the fallacious concept that the mere existence of the power in the trustees to draft legislation and to support its enactment constituted the trusts political and not charitable or educational in nature and barred them from estate tax exemption; and further that the power to transfer the trust res to a non-profit corporation, though the corporation was required to have the same objects and purposes as those specified in the will for the trusts, justified the Court in treating the gifts as though they were made directly to a corporation and, therefore, subject to estate tax.

In his opinion, Mr. Justice Augustus N. Hand wrote:

"But a dominant object of the first trust was to eliminate the capitalistic system and a designated method, and perhaps the only practicable one for achieving this result, was by securing legislation. However lawful such a means is it necessarily will involve political agitation which, as we said in *Lee v. Commissioner*, 42 F. (2d) 184, 'must be conducted without public subvention.' Such political activity was plainly designed to effect the objects for which the trust was created. The same thing is true of the political activities involved in carrying out the second trust to advance civil liberties, many of which can only be attained or effectively maintained through specific legislation. The third trust to acquire and preserve wild tracts also involves legislation if there is to be any practical advance towards the objects sought to be attained" (R. 63-64).

That portion of the opinion is then followed by an attempt on the Court's part to distinguish the facts in the case at bar from the facts and the determination in *Girard Trust Co. v. Commissioner*, 122 F. (2d) 108 (C. C. A. 3, 1941), and in *International Reform Federation v. Dis-*

strict Unemployment Compensation Board, 131 F. (2d) 337 (C. A., D. C., 1942), cert. den. 317 U. S. 693 (1942).

Judge Augustus N. Hand wrote:

"The objects aimed at in all three trusts are to a substantial extent political, however desirable the politics may be thought to be by some. They differ from *Girard Trust Co. v. Commissioner*, 122 F. (2d) 108 (C. C. A. 3), in that there was no doubt that the bequest there was to a corporate board of the Methodist Episcopal Church and there was no question that the trust fund would be deductible except for the activity of the legatee in attempting to influence legislation. In the case at bar the objects of the trusts were not to promote aims long accepted as socially desirable but to reform rather than merely to support existing systems. The decision of the Court of Appeals in *International Reform Fed. v. Dist. Unemployment Com. Bd.*, 131 F. (2d) 337, may be distinguished in a similar way, though there is room for difference as to whether the activities of the corporation involved in that case were not so political as to take it out of the classification of 'charitable' corporation, as Judge Miller argued in his dissenting opinion" (R. 64).

Petitioner submits that the decision of the Court in this case is clearly in conflict with that of the Circuit Court of Appeals for the Third Circuit in *Girard Trust Co. v. Commissioner*, *supra*, the decision of the Court of Appeals of the District of Columbia in *International Reform Fed. v. Dist. Unemployment Comp. Bd.*, *supra*, and the decision of the District Court for the District of Massachusetts in *Old Colony Trust Co. v. Welch*, 25 F. Supp. 45 (1938). This conflict will be more fully considered in the accompanying brief.

The distinction drawn by Judge Hand is non-existent, specious and dangerous. Surely this Court will not distinguish in result between a gift to a religious group and one to a non-sectarian group organized and existing for the same purposes and having the same powers. The deter-

mination of the right to the exemption under the statute should not be dependent upon the attitude or prejudices of a court, nor should one group be unclassified because of the power, either express or implied, to engage in legislative activity when the other group is not similarly treated.

Gifts for charitable or educational purposes have uniformly been liberally interpreted in order to make available to them the benefits of tax exemption statutes. Shall this Court sanction a test of tax exemption which distinguishes between objects and purposes "long accepted as socially desirable" as against the reform, or a court's opinion of the reform, of "existing systems".

Dangerous, indeed, would be a precedent creating such distinctions whereby different and unequal treatment would be accorded to charitable gifts dependent upon the personal bias of the Court.

To reach the startling result the Circuit Court not only misinterpreted the statute as it read at the time of decedent's death but definitely ran counter to sound and accepted criteria of legislative interpretation. The Court read into the statute language which Congress failed to include. Congress amended Section 812 (d) of the Internal Revenue Code upon three different occasions since its original enactment in 1926. These amendments and the amendments of parallel sections of the Internal Revenue Code conclusively demonstrate that Congress distinguished between the right to exemption of gifts to trustees and the right to exemption of gifts to corporations. (See Point IV of Petitioner's Brief.) The Court below disregarded the statutory history of Section 812 (d) of the Internal Revenue Code and interpreted that section in a manner contrary to the express intent of Congress.

In the light of the above, petitioner submits:

1. The Circuit Court of Appeals for the Second Circuit decided this case in conflict with decisions of the Circuit Court of Appeals for the Third Circuit, the Court of Ap-

peals of the District of Columbia and the District Court of Massachusetts in cases involving the same basic question of the right to tax exemption under Section 812 (d) of the Internal Revenue Code or similar statutes.

2. The Circuit Court decided an important question of statutory exemption of gifts to charitable and educational bodies in a way which will create a dangerous distinction, an unwise precedent, and a departure from the previous liberal approach of this Court and of Federal courts generally.

3. The Circuit Court of Appeals, by its decision, has so far sanctioned a departure from accepted canons of interpretation of legislative intent as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

ESTATE OF ROBERT MARSHALL,
By JAMES MARSHALL,
Executor.

